Supreme Court, U.S.
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No. 92-888

In the Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE M. BUCUVALAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, prior to the enactment of 18 U.S.C. 1346 in 1988, a liquor license and an entertainment license constituted property within the meaning of the mail fraud statute.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 970 F.2d 937.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1992. A petition for rehearing was denied on August 27, 1992. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on November 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner George M. Bucuvalas was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; and nine counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Aristedes Poravas was convicted on the RICO counts, the mail fraud conspiracy count, and seven counts of mail fraud. Petitioner Arthur L. Venios was convicted on the mail fraud conspiracy count and on one count of mail fraud. Petitioner Bel-Art Realty, Inc., was convicted on the RICO counts, the mail fraud conspiracy count, and three counts of mail fraud. Gov't C.A. Br. 3-5.

Bucuvalas was sentenced to 51 months' imprisonment, to be followed by three years of supervised release. Poravas was sentenced to 27 months' imprisonment, to be followed by three years of supervised release. Venios was sentenced to 12 months of home detention, to be followed by three years of supervised release, and a $40,000 fine. Bel-Art was ordered to pay restitution in the amount of $354,119.99 and to forfeit a total of $2,296,180.15. Gov't C.A. Br. 3-5. The court of appeals affirmed. Pet. App. 1a-21a.

1. The evidence at trial showed that, from 1980 to 1987, Bucuvalas, Poravas, and Venios owned and operated a number of nightclubs, peep shows, movie

theatres, and adult bookstores in Boston's adult entertainment district, which were managed from offices owned by Bel-Art Realty. In order to be allowed to operate many of those establishments, petitioners had to obtain alcoholic beverage licenses and entertainment licenses from municipal licensing boards. State law required license applicants to disclose the identity and background of all owners and managers of the premises to be licensed. Pet. App. 2a.

In an attempt to conceal their prior criminal records as well as their interests in various enterprises, petitioners paid straw persons and created sham corporations to serve as the owners and operators of record. Through the use of the mails, Bucuvalas, Poravas, and Venios submitted license applications to the municipal licensing boards naming the straw owners. Bel-Art, which was controlled by one of petitioners' co-conspirators, aided the fraudulent scheme by executing several mock real estate leases to the straw owners. Unaware of the misrepresentations, the municipal boards issued licenses to the ostensibly legitimate business establishments and subsequently renewed their licenses on an annual basis. Pet. App. 3a.

The scheme served a secondary purpose as well. When the municipality would threaten to revoke a license for violation of its conditions, or when the Commonwealth would attempt to collect back taxes, Bucuvalas, Poravas, and Venios merely arranged a sham sale of the establishment to a new straw owner. For good measure, between 1980 and 1986, they bribed licensing board members and police officers to avoid accountability for infractions that might otherwise

have resulted in license suspensions or revocations. Pet. App. 3a.

2. As charged in the indictment, the purpose of petitioners' mail fraud scheme was twofold: to obtain liquor and entertainment licenses from the City of Boston by means of false representations to the pertinent licensing authorities, and to defraud the Commonwealth of Massachusetts of tax revenue through the use of straw owners and shell corporations. The district court specifically instructed the jury that the mail fraud statute was applicable only if the purpose of the "scheme to defraud is a scheme to defraud of money or property, not some intangible thing like the right to honesty and fair governmental services." Gov't C.A. Br. 37.

3. On appeal, petitioners contended, among other things, that this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), precluded their convictions for fraudulently obtaining liquor and entertainment licenses from the City of Boston. Petitioners argued that the City held no cognizable property interest in unissued licenses. The court of appeals rejected that claim. First, the court concluded that this case was distinguishable from *McNally* because this case involved private conduct that had been criminalized under state law, and did not raise "concerns about force-feeding federal ethical standards to state and local governments." Pet. App. 14a.

Second, the court of appeals concluded that the municipal government had a property interest in alcoholic beverage and entertainment licenses by virtue of its "right to control the issuance of these

licenses, in order to assure their issuance to deserving licensees only." Pet. App. 15a. The court reasoned that "[i]n its broadest sense, a 'property' interest resides in the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right." *Id.* at 14a.

Finally, the court of appeals concluded that, even if the licenses did not become property until their issuance, "the city retained the right to control their alienation by the licensees, a property right analogous to those recognized at common law (fee simple determinable with a possibility of reverter)." Pet. App. 15a. Accordingly, the court held that "at the very least, [petitioners] repeatedly deprived the City of Boston of its reversionary interest in the fraudulently obtained licenses by renewing and transferring the licenses in the names of straw owners." *Ibid.*

ARGUMENT

In *McNally*, this Court held that mail fraud convictions could not be based on the theory that a public official's conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the mail fraud statute. 483 U.S. at 358-359. Petitioners contend that *McNally* precluded their convictions for fraudulently obtaining liquor and entertainment licenses from the City of Boston, arguing that the licenses did not constitute property until they were issued. The court of appeals' contrary holding is correct and, in any event, is of no prospective importance in light of

the post-*McNally* amendment of the mail fraud statute.

1. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), this Court upheld the wire fraud conviction of a Wall Street Journal columnist who traded stock on his knowledge of what the column would say. The Court made clear that the intangible nature of the misappropriated confidential information did not make the information any less a form of "property" within the meaning of the mail fraud statute. *Id.* at 25-27. The Court explained that the Journal had been deprived of its property interest in the exclusive use of its confidential information, even though the defendants had neither interfered with the Journal's use of that information nor deprived the Journal of the first public use of it. *Id.* at 26-27.

In this case, the court of appeals correctly concluded that the City of Boston had a property interest in the unissued licenses similar to the Wall Street Journal's interest in maintaining the confidentiality of its business information. In *Carpenter*, the Court held that the Journal's right to control the manner of the use, dissemination, and alienation of the wrongfully disclosed confidential information was a property interest. Likewise here, "what the [City] (and derivatively its people) lost was the right to keep its [liquor and entertainment] licenses to itself and to bestow them on persons who had fairly earned them." *United States* v. *Martinez*, 905 F.2d 709, 714 (3d Cir.), cert. denied, 111 S. Ct. 591 (1990). Although different in character, the deprivations "are in each instance 'of something of value.' " 905 F.2d at 714-715, quoting *Carpenter*, 484 U.S. at 27. Indeed, petitioners do not

dispute that a license constitutes valuable and constitutionally protected property in the hands of the licensee. In light of *Carpenter*, there is no reason to make an "esoteric distinction" between an unissued license and an issued one. *Martinez*, 905 F.2d at 714. See also *Frank* v. *United States*, 914 F.2d 828, 833 (7th Cir. 1990) (surrendered driver's license is property); *United States* v. *Novod*, 923 F.2d 970, 973 (2d Cir.), reh'g on related grounds, 927 F.2d 726 (2d Cir.), cert. denied, 111 S. Ct. 2018 (1991) (two members of three-judge panel express disagreement with controlling circuit precedent that unissued waste dumpsite permit is not property).

2. As petitioner points out (Pet. 7-8), several courts of appeals have reversed convictions under *McNally* in cases involving licenses of different types. *United States* v. *Schwartz*, 924 F.2d 410 (2d Cir. 1991) (export license); *United States* v. *Granberry*, 908 F.2d 278 (8th Cir. 1990) (bus driver's license), cert. denied, 111 S. Ct. 2024 (1991); *United States* v. *Kato*, 878 F.2d 267 (9th Cir. 1989) (private pilot's license); *Toulabi* v. *United States*, 875 F.2d 122 (7th Cir. 1989) (taxi driver's license); *United States* v. *Dadanian*, 856 F.2d 1391 (9th Cir. 1988) (gambling license); *United States* v. *Murphy*, 836 F.2d 248 (6th Cir.), cert. denied, 488 U.S. 924 (1988) (bingo license). The conflict among the courts of appeals, however, is not of sufficient continuing importance to warrant this Court's review.

Following the Court's decision in *McNally*, Congress amended the mail and wire fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the

intangible right of honest services." 18 U.S.C. 1346, added by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508. The legislative history confirms that the amendment "overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden); see also 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) ("it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property").

Prior to *McNally*, the courts upheld mail fraud convictions for defrauding licensing agencies of liquor licenses in circumstances similar to those here. *E.g.*, *United States* v. *Haimowitz*, 725 F.2d 1561 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Castor*, 558 F.2d 379 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978). Accordingly, because Section 1346 was intended to overrule *McNally*, courts should reach the same conclusion in cases decided under the new statute.

In any event, review is not warranted at this time. All of the decisions holding that licenses are not property under the mail fraud statute arose from schemes executed before Section 1346 was enacted. *United States* v. *Schwartz*, 924 F.2d at 418-419; *United States* v. *Granberry*, 908 F.2d at 281 n.1; *United States* v. *Kato*, 878 F.2d at 269; *Toulabi* v. *United States*, 875 F.2d at 123; *United States* v. *Dadanian*, 856 F.2d at 1392; *United States* v. *Murphy*, 836 F.2d at 248. This case also arose before Section 1346 took effect. Pet. App. 10a n.9. The mail

fraud cases based on schemes executed before November 1988 constitute a limited and rapidly diminishing set. While a decision holding that schemes such as the one executed by petitioners violated the mail fraud statute even before Section 1346 was enacted would necessarily mean that such schemes remain unlawful, a contrary decision in this case would not determine whether such schemes are now prohibited by the mail fraud statute. Accordingly, there is no good reason for this Court to resolve the conflict that existed prior to the enactment of Section 1346 as to whether licenses constitute property under the mail fraud statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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